No. 15,849

IN THE

United States Court of Appeals

For the Ninth Circuit

American Casualty Company of Reading, Pennsylvania,
Appellant,

vs.

Leonard F. Harman and Ruth V. Harman,
Appellees.

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellees (plaintiffs) commenced this action in the Superior Court of the State of California, County of Los Angeles, by complaint for declaratory relief against appellant (defendant). Appellant removed the cause, by reason of diversity of citizenship, to the District Court for the Southern District of California, Central Division; the amount in controversy exceeds $3000. After removal an amended complaint was filed in the District Court [R 3-14]. This appeal is from a final judgment rendered after trial by the Court sitting without a jury [R 35-38; 39].

Jurisdiction of this cause is conferred on the District Court by 28 *USC* §1332 and §2201. Jurisdiction

to review the judgment herein is conferred upon this Court by 28 *USC* §1291 and §1294 (and see §2201).

STATEMENT OF CASE

Appellees (husband and wife) owned two dwellings at Portuguese Bend, California; they resided in one, and rented the other to a tenant [R 49-50]. Appellant issued two policies of insurance to appellees, each covering on one of the buildings and its contents [Ex 1, on the dwelling occupied by appellees; Ex 2, on the rented dwelling]. While the policies were not identical in form, in general each covered its described dwelling against "all physical loss", and the contents against loss by fire, landslide, and other specified perils. Each policy contained the usual clause permitting the insurer to cancel the policy at any time upon specified notice.

In October 1956, while the policies were in force, a large earth movement or slide occurred in the area and caused cracks to appear in the insured buildings [R 50-52]. The slide and damage were progressive [R 53], and were still continuing at the time of the trial in June 1957 [R 45, 54]. Notice of the damage being caused by the slide was promptly given to appellant by appellees [R 52], and appellant inspected the property in November and again in December of 1956 [R 52-54].

By written notices of cancellation [Ex 3], appellant attempted to cancel both policies as of 4 February

1957. It is the effectiveness and validity of these cancellation notices that is involved in this action.

On 4 February 1957 appellees commenced this action. Their amended complaint prays [R 13] for a money judgment for the full face amount of both policies, for certain injunctive relief, and for a declaration that the cancellation notices were of no validity by reason of the existing slide condition and that the policies would remain in full force as to all hazards insured against until the ultimate cessation of the landslide. At the trial appellees conceded that the loss to that time was not total to insurance, and they did not ask for any money judgment [R 20].

The declaratory judgment rendered by the trial court [R 35-38] decreed as follows:

(1) The cancellation notices were "null and void" [R 35, ¶1];

(2) Both policies shall continue to remain in full force and effect until (a) the Court makes a further order that the landslide has terminated, or (b) appellant shall have paid to appellees the full face amount of both policies, or (c) appellees shall have stipulated in writing that all policy obligations have been fully performed by appellant [R 35-36, ¶2],—after any of these events have occurred "the policies may be cancelled" [R 38, ¶5];

(3) Policy coverage for landslide damage shall continue, regardless of expiration dates of the policies and without further payment of premium, as long as the landslide continues [R 37-38, ¶3g];

(4) Policy coverage for all other hazards insured against shall continue, regardless of expiration dates of the policies, subject only to continued payment or tender of premiums by appellees for as long as the policies remain in full force and effect under ¶2 [R 36-37, ¶3,a-e], and if such payment or tender of premiums is not made appellant "may serve notices of cancellation on [appellees] as to insurance coverage against all hazards except landslide" [R 37, ¶3,f]; and

(5) Appellant is enjoined from cancelling or attempting to cancel its policies except as specifically provided in the judgment [R 38, ¶4].

Appellant conceded at the trial (and agrees now) that the cancellation notices did not have any effect on appellant's liability for landslide damage from the slide going on when the cancellation notices were served, and that appellant is liable for such damage as though no cancellation notices had been served [R 59-61, 65-66, 79-82].

The case turns here, as it did below, upon a record consisting mainly of documentary evidence plus a minor amount of oral testimony, as to all of which there is no substantial factual conflict.

SPECIFICATION OF ERRORS

I.

A. Finding XV [R 32] to the effect that the cancellations were "not timely" because at the time of service of the notices of cancellation the properties had

been damaged by and were still endangered from a continuing landslide, is clearly erroneous.

B. The Court erred in concluding and adjudging that the cancellation notices were of no force or effect and were null and void [Conclusion III, R 33; Judgment ¶1, R 35]; and in concluding that the policies were "not cancellable" while the landslide was in progress or while further damage from it was "imminent" [Conclusion II, R 33]; and in concluding that the notices of cancellation were "not timely" because not given until after appellant had notice of the existing landslide condition [Conclusion V, R 34].

C. The Court erred in concluding that the hazards insured against were not severable and that the contracts were entire [Conclusion IV, R 33], with respect to the right of appellant to exercise its contractual right of cancellation as to all losses and hazards excepting damage already caused or that might thereafter be caused by the then existing landslide condition.

II.

A. Findings XVI and XVII [R 32-33] to the effect that appellees have a "right" to continued insurance coverage under the policies (1) for hazards other than landslide (a) after the effective date of cancellation stated in the cancellation notices, and (b) after the dates of expiration stated in the policies by continuing to pay or tender to pay additional premiums; and (2) for the existing landslide, after the dates of expiration stated in the policies—are clearly erroneous.

B. The Court erred in concluding and adjudging that the policies could be continued in force after the expiration dates stated in the policies, for perils other than landslide, at the option of appellees by payment or tender of future premiums [Conclusion VII, R 34; Judgment ¶3, R 36-37]; and that even after default in such payment or tender the policies would remain in force unless cancelled by appellant [Judgment ¶3,f, R 37].

C. The Court erred in concluding and adjudging that the policies would continue in force after the expiration dates stated in the policies for the existing landslide peril, however long it might continue [Judgment ¶3,g, R 37-38].

D. The Court erred in adjudging (1) that the policies will remain in full force and effect until either (a) it is determined by further order of the Court that the existing landslide has "stabilized" and that "any other insured hazards which had their inception before the permissible termination of the insurance coverage" shall have terminated, or (b) appellant shall have paid to appellees the full face amount of both policies, or (c) appellees give to appellant "a satisfaction of judgment" or a written "stipulation" that appellant has fully performed all of its policy obligations [Judgment ¶2, R 35-36]; and (2) that even thereafter the policies would remain in force unless cancelled by appellant [Judgment ¶5, R 38].

III.

The Court erred in enjoining appellant from cancelling "claiming to cancel", or serving notices of cancellation of the policies [Conclusion VIII, R 34; Judgment ¶4, R 38].

ARGUMENT

The entire problem in this case revolves around the answer to one legal inquiry: What is the effect of an existing (and continuing) loss condition upon the insurer's right, granted by policy provision, to cancel the policy?

There are two closely related questions which have been dealt with by the courts: (1) What if there is no *existing* loss condition, but rather a condition that *threatens* to cause loss to the insured property? (2) What if the policy, instead of being cancelled, is about to expire or terminate by virtue of its own provisions?[1]

Because only a single point of law in a rather limited field is involved and because the decided cases are relatively few, we have chosen to review the present state of the law first [Argument, I], and then to treat of the application of the established rules to the case at bar [Argument, II]. We hope that this will make for clarity and simplicity.

[1]When we speak of "loss" or "loss condition" we refer, of course, to the consequences of a peril insured against by the policy.

I. THE AUTHORITIES.

A. LOSSES AFTER POLICY EXPIRATION.

1. Liability policies.

The problem of liability for a loss which occurs, after expiration of the policy term, from a cause of loss that is covered by the policy and became operative while the policy was in effect, is one that arises in connection with liability policies as well as property damage policies.

Perhaps the outstanding case on this subject is *Export SS Corp v American Ins Co* (CA 2, 1939) 106 F2 9. The owner of a steamship took out a policy of marine insurance with Company A covering loss arising from liability for damage to cargo; the policy term ran from 20 February 1936 to 20 February 1937. The owner later obtained an identical policy written by Company B which ran from 20 February 1937 to 20 February 1938. During January 1937 the ship took on tobacco, which it stored next to some valonia. When the ship was unloaded on 13 March 1937 it was discovered that the tobacco had been seriously damaged by heat and moisture from the valonia. The insured shipowner paid the cargo owner, and then sued both his insurers. The trial court found that substantial damage had occurred to the tobacco during the term of Policy A (that is, by 20 February 1937); and it held Company A liable for the entire loss whether occurring before or after that date, and held that Company B was not liable at all. The trial court felt that the controlling consideration was that Policy A was in force when the act causing the damage (namely, bad storage location) had taken place and when the first damage occurred.

The judgment was reversed on appeal. The court held that Company A was liable only for that part of the damage that occurred during the term of its policy, and that Company B was liable for all damage occurring during the term of its policy. In holding that each insurer was so liable, the court said [p10-11]:

> ". . . The insurer has no obligation as to losses from liabilities accruing before or after the term. The time of accrual of the insured's liability is the determining factor, not the time of an event which ultimately results in liability . . . *So too with insurance against loss of property.* The insurer must respond for the loss sustained *during the term* from the causes insured against, and to ascertain what that loss was later developments may be looked at. But the policy does *not* cover loss incurred *after the term, however inevitable the loss may have been from causes operating during the term.* [Cits] . . .
>
> In *fire insurance cases* there is a *departure* from the general rule. It is held that if the policy expires after fire has commenced to burn the property insured, and the fire is a continuous one extending beyond the period of insurance, the insurer is liable for the entire loss. [Cits] Separation of the loss, it is said, would be impossible as a practical matter, any attempted division resting on a mere guess. So the fire is deemed one event, taking place when the fire touches the insured property. [Cit] The rule works to the advantage of the insured . . . The courts have refused to extend the rule to a case where the fire has not yet touched the insured property at the

> expiration of the contract of insurance, although its destruction by fire raging in adjoining property may then be inevitable. In such cases the general principle is followed that the insurer is not liable for a loss occurring after the period covered. [Cits]"[2]

The opinion notes that the infliction of the damage to the tobacco was not a single event; heat and moisture from the valonia flowed to the tobacco for more than a month. There was evidence that 26% of the total damage had occurred by expiration of Policy A, and that the balance occurred during the term of Policy B. Company A argued that the other insurer should pay the entire loss, because there was no liability until 13 March 1937 when the failure to make delivery of the tobacco in good condition occurred. The court rejected this, noting that a cause of action had arisen before expiration of Company A's policy for the damage done up to that point. The court held Company A liable for 26% of the loss, and Company B for 74%.

For California cases involving liability policies and reaching results similar to the *Export SS* case, see:

Remmer v Glens Falls Indem Co (1956) 140 CA2 84, 295 P2 19;

Protex-A-Kar Co v Hartford A&I Co (1951) 102 CA2 408, 227 P2 509;

Tulare County Power Co v Pacific Surety Co (1919) 181 C 489, 185 P 399.

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[2]Emphasis ours throughout this brief, unless otherwise noted.

An annotation in 45 ALR2 999 (1956), dealing with products liability insurance, points out that conflicting decisions on whether losses under liability policies occurring after expiration of the policy are covered or not often turn upon the specific language contained in the policy in suit.

2. Fire policies, generally.

Turning to the fire insurance field, we shall first consider the leading case of *Rochester etc Ins Co v Peaslee-Gaulbert Co* (Ky 1905) 1 LRANS 364, 9 AnnCas 324. In that case the fire started on the insured premises within a few minutes of the "noon" which was specified in the policy as the time of expiration.[3] The trial court instructed the jury that if it found that the fire started to burn in the insured buildings *after* "noon" but was burning before noon in adjacent premises to such an extent that the destruction of the insured buildings was inevitable before noon, then recovery could be had under the policy. This instruction was held to be error, the court saying [1 LRANS, 369]:

> "The risk assumed by the insurer was that of loss or damage by fire pending the term written in the contract. *It did not insure against peril to the property without loss during the policy term.* If the fire broke out in the insured building before the policy expired, and continued to burn thereafter until it was totally destroyed, the loss is one occurring within the insured period. It is all deemed one event, and not severable. A damage

[3]Much of the opinion is given over to whether standard time is to be applied in determining the meaning of "noon".

begun is damage done, where the culmination is the natural and unbroken sequence of the beginning. We have been cited to no case which holds that *mere imminence* of loss, or *even certainty* of loss, during the life of a contract of insurance, would justify a recovery, where there was in fact no loss or damage during the life of the contract. *No case in either marine, fire, or life insurance so holds. To do so would be to extend the term of the policy, and all liability under it, including its beginning, for a period beyond the contract for which the consideration was paid.* Doubtless it was known to be inevitable, as it proved to be, that certain blocks of the business houses in Baltimore would be destroyed by the great fire there recently, which burnt over a considerable part of the city, and raged for several days. Yet it is entirely possible that contracts of insurance expired upon the buildings last burned after the fire had begun elsewhere in their vicinity. It would be astonishing if the liability of the insurers was extended indefinitely beyond the term of their contract merely because a danger had occurred during the contract which would lead to loss thereafter . . ."

Some of the insurance in this case also covered merchandise in the buildings. The court said that the same rules applied here as to the buildings themselves, continuing [p370]:

"Where the fire had begun in the building containing the merchandise before the expiration of the policy term, and by reason of that fire it was impossible to remove or save the merchandise from loss or damage, it is to be deemed a loss

occurring in the life of the policy, whether the fire was actually communicated to the specific articles of merchandise within such time, or not."

A holding in accord with that in the *Rochester* case is found in *Globe etc Ins Co v Moffat Co* (CA 2, 1907) 154 F 13. Bark in a cannery plant was insured. The fire began 30 minutes before expiration of the policy term. The trial court instructed the jury that if the bark ignited in such a way that all would be destroyed naturally, inevitably, and directly without the intervention of any new cause, the plaintiff was entitled to full recovery even though some of the loss occurred after expiration of the policy. The judgment for plaintiff was affirmed on appeal, the opinion concerning itself primarily with other issues.

3. Fire policies, fallen building clause.

Several cases which have discussed this question of liability for loss occurring after policy termination involve the fallen building clause[4] formerly found in fire insurance policies. In some of these cases the building fell after the building was on fire, and the contention was made that the insurer was liable only for that portion of the fire damage occurring before the fall of the building. The courts have uniformly held the insurer to be liable for the entire loss.

The leading case in this field is a decision of the California Supreme Court, *Davis v Connecticut Fire*

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[4]The clause provided that if the insured building or any substantial part of it should fall, except as the result of fire, all insurance under the policy on the building and its contents would immediately cease.

Ins Co (1910) 158 C 766, 112 P 549, 32 LRANS 604. In holding that the insurer was liable for all of the damage caused by a fire burning on the insured premises before the building fell, even though some of the damage occurred before and some after the fall, the court pointed to the practical impossibility of separating the fire loss that occurred before the fall of the building from that occurring afterward.

Similarly, see:

Hartford Fire Ins Co v Doll (CA 7, 1928) 23 F2 443, 56 ALR 1059;

Pruitt v Hardware etc Ins Co (CA 5, 1940) 112 F2 140;

Wiig v Girard etc Ins Co (Neb 1916) 159 NW 416, LRA 1917F 1061.

These cases cite and rely upon the *Rochester* and *Davis* cases, supra.

B. CANCELLATION CASES.

The general attitude of the California courts with respect to the validity of cancellation clauses in insurance policies is well stated in *Protex-A-Kar Co v Hartford A&I Co* (1951) 102 CA2 408, 227 P2 509. This was a declaratory judgment suit brought by an insured to fix responsibility on a liability insurer for damage occurring after the policy had been cancelled, but resulting from the use of insured's product which

had been sold before cancellation. In holding that there was no liability, the court said [227 P2, 512]:

> "Since recovery is limited to accidents occurring 'during the policy period' the insurance company cannot be held liable for accidents occurring after . . . the date of the cancellation. To construe it otherwise would give effect only to the clause declaring the policy period [that is, the original term of the policy] and would ignore the provisions of [the] cancellation clause. Since the language of the policy is clear and unambiguous its plain and unequivocal terms cannot be disregarded to make a new contract for the parties. [Cits]"

There are, of course, many cases and text statements to the effect that cancellation of an insurance policy can not affect rights which have already accrued under the policy as the result of a loss which preceded the effective date of cancellation.

We have no quarrel with this rule, and are not disputing liability for damage caused by the landslide in progress at the time of cancellation and prior to expiration of the original policy term.

There are a number of authorities which hold, and it is also well settled, that it is not necessary for the peril insured against to have actually reached and damaged the insured property in order for an attempted cancellation to be ineffective; it is sufficient that the property is exposed at the time of cancellation to an immediate and impending danger from an insured peril, to such a degree that to allow cancellation would operate as a fraud upon the insured.

One of the earliest cases on this point is

Home Ins Co v Heck (1873) 65 Illinois 111, 2 Ins Law Jnl 437.

In the *Heck* case a fire policy was issued to plaintiff insuring on cordwood. The wood was destroyed by fire and suit was brought on the policy. The defense was that before the fire reached the wood the insurer had cancelled the policy in accordance with a cancellation clause contained in it. The trial court instructed the jury that if the wood was in greater danger from fire at the time of cancellation than it was when the policy was issued, then the cancellation was ineffective. On appeal this instruction was held erroneous; the grounds for the holding and the purport of the case appear from the following portion of the opinion [2 Ins Law Jnl, 439]:

> "We think this [instruction] is laying down the law too broadly, for, by the terms of the policy, the insurer had a right to [cancel]. It cannot be claimed, however, that an insurer against fire can, when the fire is approaching the property insured, cancel the policy. This would be acting in *bad faith,* and would not be justified by the law of the contract. Insurance is a contract of indemnity, the basis of which is, or ought to be, good faith on both sides. Of what avail would it be to take a policy against fire to permit its cancellation when the fire is approaching."

The opinion goes on to say that the court properly refused an instruction that the insurer had an absolute right to cancel before the fire reached the insured property:

"The objection to this instruction is obvious . . . It leaves out of view *threatening and immediate danger* which may environ the insured property . . . 'No court would permit an insurance company to declare a policy upon a certain building cancelled when the adjoining building was in flames.' "

In order to understand the proper scope and thrust of the *Heck* case and subsequent authorities, an examination of some of the later authorities will be helpful.

The general rule is well stated in 6 *Couch, Cyc Ins Law* 5079:

"Although a reserved right to cancel a fire policy may be exercised in case the risk is subjected to a greater danger of fire than existed when the policy was issued, provided the right is exercised in good faith, yet, if the act of cancelation will operate as a *fraud* upon the insured, by reason of some *special emergency,* such as an approaching conflagration, or a probable and threatened peril from fire which makes the liability to loss *imminent,* the privilege reserved to terminate the policy on notice cannot be exercised, for to admit such a right would render policies valueless. And in case the notice of cancellation is given in the face of such *imminent danger,* it cannot aid the insurer that the property is actually destroyed by fire from another quarter."[5]

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[5]It will be recognized that this statement is substantially merely a summarization of the *Heck* opinion, which indeed is cited in a footnote to the text.

Necessary limitations to the application of the rule prohibiting cancellation where loss is imminent are well expressed in *Treadwell v. International etc Assur Co* (Tex 1933) 60 SW2 536. Insurer issued to plaintiff's husband a combination accident and health policy naming plaintiff as beneficiary. The policy gave the insurer a right of cancellation. In August 1929 and while the policy was in force the husband became disabled by sickness, and continued disabled until October 1930 when he was instantly killed by an accidental gas explosion in his home. In November 1929 the insurer served a notice of cancellation, by reason of the disabled condition of the husband, which included a combination of very serious illnesses; however, the insurer continued to pay the sickness disability benefits called for by the policy, and did so from August 1929 until death. The suit was brought to recover for the accidental death. The insurer defended on the ground that the policy had been cancelled. Plaintiff relied upon the theory (analogous to that adopted by the trial court in the case at bar) that the imminent peril cancellation rule voided the attempted cancellation. We quote from the opinion [p537-8]:

> "Appellant [plaintiff] presents the proposition that though the policy in question reserves to the insurer the right to cancel the same upon notice, nevertheless the insurer will not be permitted to cancel the policy when such cancellation would operate as a fraud upon the rights of the insured; that the cancellation in this case under the facts did so operate and the insurer was estopped from exercising the right reserved.

In this connection appellant invokes cases from other jurisdictions which have denied the reserved right to cancel, when, at the time, a loss was imminent, and to permit such cancellation would operate as a fraud upon the assured and render the policy valueless. The question has usually arisen in connection with fire insurance policies.

It is unnecessary to review and discuss these cases. The effect of the rulings therein is well stated by Couch in 6 Cyclopedia of Insurance Law, §1434 . . .[6]

None of the authorities go so far as to deny the insurer a reserved right of cancellation simply because the risk of loss from the hazard insured against has *increased.*

We think the line of authority invoked by appellant is applicable *only when loss is imminent* and the hazard insured against is *immediately impending.*

The present facts show no imminent and impending danger to the insured of injury or death by accidental means. It is simply shown that he had become a *very hazardous risk* for accident insurance. *This condition did not deprive the insurer of its plain and unambiguous contractual right to cancel.* To hold otherwise would be to disregard the settled rule that the parties are at liberty to contract as they please with respect to cancellation and that stipulations of that character are entirely valid. [Cit]

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[6]Here the court quotes from Couch, the quotation consisting in the main of the portion already quoted immediately above in this brief. The opinion then gives a similar quotation from 3 *Joyce on Insurance,* §1662.

The cancellation was authorized by the contract between the parties, and it cannot be regarded as in fraud of the rights of the insured.

Nor is there any merit in the contention that the cancellation was waived by appellee's action in requesting and receiving from the insured's physician reports concerning his physical condition while he was ill.

Appellee was obligated to [husband] under the sick benefits of the policy—an obligation which would continue as long as his disability from sickness continued. Under such circumstances, appellee had the right to inquire and inform itself concerning [his] physical condition. . . . Requesting and obtaining such information . . . raised no issue of waiver of the right of cancellation theretofore exercised."

Subsequent cases have cited and followed the holding in Treadwell:

Friedman v Connecticut etc Ins Co (1937) 296 NYS 146;

Dullum v. Northern etc Ins Co (Ore 1942) 127 P2 749.

For an earlier decision of similar import, see *Travelers etc Assn v Dewey* (Tex 1904) 78 SW 1087.

For the sake of completeness, we refer to the following cases in the property insurance field which deal with the general rule concerning cancellation made after loss has occurred:

Stebbins v Lancashire Ins Co (1880) 60 NH 65 [fire insurance];

Lipman v Niagara Fire Ins Co (NY 1890) 24 NE 696, 8 LRA 719 [fire insurance];

Duncan v NY etc Ins Co (NY 1893) 33 NE 730, 20 LRA 386 [marine insurance];
Hasterlik v NJ etc Ins Co (1923) 229 Ill App 604 [burglary insurance];
Stephens-Adamson Mfg. Co. v Fireman's Fund Ins Co (1930) 257 Ill App 443 [fire insurance];
Zimmerman v Union etc Ins Co (Ore 1930) 291 P 495 [automobile insurance].

References to the same rule will also be found in the following annotations: 17 *AnnCas* 795, 800; 50 *LRANS* 35, 37.

The purport and limitation of the rule is well exemplified by the following quotation from the *Hasterlik* case (supra):

> "It is elementary that a policy of insurance . . . cannot be canceled after a loss has occurred *so as to affect the rights of the [insured] so far as that particular loss is concerned.*"

C. AUTHORITIES CITED BELOW.

The purport of the principal authorities cited by the District Court in its opinion [R 24-26] in support of its decision here is merely to the effect that cancellation of an insurance policy can not affect rights already accrued under the policy by reason of a loss that preceded the effective date of cancellation.[7] We refer to: 29 *AmJur* 261; 32 *CJ* 1246 (and compare, to

[7]See our discussion of the "Cancellation Cases" in the immediately preceding section of this brief.

the same effect, 45 *CJS* 81-82); and *Ins Co of North America v US* (CA 4, 1947) 159 F2 699, 701.

The cases of *Pruitt v Hardware etc Ins Co* (CA 5, 1940) 112 F2 140, and *Davis v Connecticut Fire Ins Co* (1910) 158 C 766, 112 P 549, 32 LRANS 604 cited by the trial court [R 24-25] are not cancellation cases, but are fallen building clause cases. We have discussed *Davis* and cited *Pruitt* supra, in the section dealing with the fallen building clause fire cases.

The reference to "1 L.R.A. (N.S.) 364-9" [R 25] is to the case of *Rochester etc Ins Co v Peaslee-Gaulbert Co* (Ky 1905) 1 LRANS 364, 9 AnnCas 324, which we have fully considered above. It is not a cancellation case.

The case of *Globe etc Ins Co v Moffat Co* (CA 2, 1907) 154 F 13 [cited at R 24] is considered above.

The portion of the *Heck* opinion quoted by the District Court [R 25] adds nothing to the basic holding of *Heck* (which we have discussed). It is merely to the effect that if damage to the insured property threatens from more than a single fire, the rule against cancellation would apply regardless of which fire caused the damage. As *Heck* puts it, the cancellation "would be an act done *in the face of a threatened and approaching danger"*, and therefore ineffective.

D. SUMMARY OF THE EXISTING LAW.

We are now in a position to summarize the law.

1. Neither property nor liability policies cover loss occurring after expiration of the term of the policy, even though—

(a) The loss condition had commenced to operate during the policy term, and/or

(b) Actual damage had occurred to the insured property prior to expiration, and/or

(c) Further loss to the insured property from the same cause after expiration is inevitable.[8]

2. The fire cases enunciate the same rule, except that (contra to ¶b just above) if the fire has actually damaged the insured property during the policy term and continues to burn at and after expiration, the insurer is held liable for the entire loss from that fire.

The rationale of these cases is that to divide the fire loss into pre- and post-expiration damage would be a practical impossibility and would rest on mere guess.

But the courts have refused to extend the fire rule to the "inevitable" cases; that is, they hold that post-fire damage from a fire raging in adjacent premises at the time of expiration, but which did not reach the insured premises until after expiration, is not recoverable.[9]

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[8] *Export SS Corp v American Ins Co* (CA 2, 1939) 106 F2 9;
Remmer v Glens Falls Indem Co (1956) 140 CA2 84, 295 P2 19;
Protex-A-Kar Co v Hartford A&I Co (1951) 102 CA2 408, 227 P2 509;
Tulare County Power Co v Pacific Surety Co (1919) 181 C 489, 185 P 399.
See, supra, Argument, I, A.

[9] *Rochester etc Ins Co v Peaslee-Gaulbert Co* (Ky 1905) 1 LRANS 364, 9 AnnCas 324.

In *Rochester* a judgment for plaintiff was reversed because the trial court had instructed the jury that if the fire burning in adjacent premises before the "noon" of expiration of the policy made

Generally, see supra, Argument I, A.

3. The cancellation cases quite properly inject an added element (fraud, bad faith) into the determination of when there will be liability for post-termination losses.

Their thesis runs as follows. An insurance contract is one in which the utmost good faith is required on both sides. Whatever the rule may be when the policy *expires* by its own terms, it would be unconscionable to permit the insurer by exercising its reserved right of cancellation to cut off liability for damage that is inevitably about to occur to the insured person or property from an insured peril which, while it has not yet reached the subject of insurance, is so imminent that loss under the policy is threatening and immediate.

This rule is not a rule that is limited to property or fire insurance. It applies equally to all kinds of insurances. While some of the language used in some

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destruction of the insured premises inevitable, and they were destroyed after "noon" but not at all damaged before that hour.

Globe etc Ins Co v Moffat Co (CA 2, 1907) 154 F 13.

In *Globe* the fire reached the insured property before the time of expiration. In allowing recovery for all damage, pre- and post-expiration, the court emphasized that all the damage must have resulted from the pre-expiration fire *naturally, inevitably, and directly without the intervention of any new cause.*

Davis v Connecticut Fire Ins Co (1910) 158 C 766, 112 P 549, 32 LRANS 604.

Hartford Fire Ins Co v Doll (CA 7, 1928) 23 F2 443, 56 ALR 1059;

Pruitt v Hardware etc Ins Co (CA 5, 1940) 112 F2 140;

Wiig v Girard etc Ins Co (Neb 1916) 159 NW 416, LRA 1917F 1061

The rationale of the fire cases in the text of this brief is also well expressed in the *Export SS* case supra, footnote 8.

of the cases speaks in terms of the invalidity of the cancellation itself, it should be remembered that these are single peril situations where no question was before the court except that of continuing liability from the precise existing peril which commenced prior to the cancellation and which caused the damage after cancellation.

The authorities make it quite clear that neither mere increase of risk nor the existence of a "very hazardous" condition is sufficient to inhibit cancellation; the danger of loss must be "threatening and immediate", "imminent", or "immediately impending". They further demonstrate that it is not the cancellation as such that is proscribed, but rather the effectiveness of the cancellation to cut off liability for the loss thereafter occurring from the existing peril.[10]

II. THE ERRORS BELOW.

A. THE EXISTING LANDSLIDE CONDITION DID NOT PREVENT OR NULLIFY CANCELLATION OF THE POLICIES. (Specification I)

In its opinion [R 26] and conclusions of law [IV, R 33] the District Court held that the policies were

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[10] *Home Ins Co v Heck* (1873) 65 Illinois 111, 2 Ins Law Jnl 437; *Treadwell v International etc Assur Co* (Tex 1933) 60 SW2 536;
Friedman v Connecticut etc Ins Co (1937) 296 NYS 146;
Dullum v Northern etc Ins Co (Ore 1942) 127 P2 749;
Hasterlik v NJ etc Ins Co (1923) 229 Ill App 604.
See, supra, Argument, I, B.

"entire", "indivisible", and "not severable".[11] From this it presumably followed that even though appellant might have cancelled as to hazards other than landslide had these been insured against separately (albeit in the same policies), such was not the case here, and so the cancellations were void *in toto.* While we do not think the question of severability of the policies in suit could be so lightly disposed of *if* it were decisive,[12] the fact is that no attempt was made by appellant to cancel part only of the policies; rather each notice of cancellation purported to cancel the respective policy as an entirety. It is therefore our conclusion that the matter of severability of the policies in suit for purposes of cancellation does not arise, and need not be further considered.[13]

The existing landslide had already caused actual damage to the insured property. It is not contended by appellant that the cancellation had any effect upon damage caused or to be caused by the existing slide condition. We concede that our liability for such damage is to be judged as though no cancellation notices had ever been sent.

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[11]In support the Court cites:
17 *CJS* 788;
Goorberg v Western Assur Co (1907) 150 C 510, 89 P 130, 10 LRANS 876, 119 AmStRep 246, 11 AnnCas 801;
US v Bethlehem Steel Corp (1942) 315 US 289, 86 LEd 855.

[12]An interesting discussion of severability as applied to insurance policies is found in 4 Appleman, Insurance Law & Practice, ch 118.

The *Goorberg* case is readily distinguishable from the situation at bar. See: *Coniglio v Connecticut Fire Ins Co* (1919) 180 C 596, 182 P 275, 5 ALR 805, annotated on the divisibility point at p808; also, for the California rule, 29 *AmJur* 201, Insurance §187.

[13]We have specified the conclusion as to severability as error [Conclusion IV, R 33; Specification I] only for the sake of completeness.

But we earnestly contend that the Court erred in holding that the existing slide and/or the damage from it completely abrogated the contractual right of cancellation, so that the cancellation notices were (as the Court put it) "null and void". No decided case and no authority supports this view. Nor is it supported by the *ratio decidendi* of any case that has come to our attention. To the contrary, all authority is opposed.[14] The *Treadwell* case is quite analogous, and quite fatal to the result reached below.

Perhaps the District Court felt that the coverage against "all physical loss" made it impossible to distinguish between physical loss caused by landslide and that which might be caused by, say, fire. But there are two fallacies here.

The minor fallacy is that only *some* of the insured property was covered for "all physical loss"; with a minor exception all the personal property insured was covered against loss from specified perils.

The major fallacy is more basic, and may be illustrated by an example. Suppose a straight fire policy, containing the usual 5-day cancellation clause. While a fire is raging in adjoining premises to the north of the insured building the insurer serves a cancellation notice. Assume that within two days the fire is extinguished without burning of or damage to the insured building. Assume that on the sixth day after service of the cancellation notice, a second fire starts on the adjoining premises to the south from causes unrelated to the first fire; the second fire promptly

[14]See, Summary of the existing law; Argument, I, D, ¶3.

spreads to and consumes the insured building. Is the insurer liable? We submit that the answer must be in the negative. While we know of no such case, every principle of law and equity would seem to support this result. True, under settled rules, the cancellation would not have been effective to defeat liability for any damage to the insured building from the first fire; but there seems to be no reason why the notice would not have served to cancel the policy in all other respects.

The District Court has fallen into error by failing to distinguish between the right to recover for a particular loss already occurred or occurring, and the right to rely on the policy for losses that may (or may not) occur *in futuro*. Here we may profitably consider the provision in most insurance policies prohibiting their assignment. It has always been held that after loss has occurred the insured's right of recovery may be freely assigned despite the policy provision *and* without in any way invalidating it.

> "It is settled that after a loss has arisen liability is fastened upon the insurer and any right of the insured as a result of the loss may be assigned with or without the consent of the insurer. [Cits]" *Vierneisel v Rhode Island Ins Co* (1946) 77 CA2 229, 175 P2 63, 65.

See also: 5 *Appleman, Insurance Law & Practice* 637, §3458.

The right of recovery for damage from a pre-existing peril (as to which the insurer may not cancel) is distinct from general rights under the policy to recover in the future for future losses that may or

may not occur from future perils. And a cancellation of the policy may cut off the latter without affecting liability for the former.

29 *AmJur* 261; Insurance § 281.

The existing landslide condition did not therefore abrogate or suspend the contractual right of cancellation. It merely meant that the right of appellees to recover for damage caused or to be caused by the landslide would remain exactly as if no notices of cancellation had been served.

B. THE COURT WAS WITHOUT POWER OR AUTHORITY TO DECREE CONTINUANCE OF THE POLICIES BEYOND THEIR STATED TERMS, WITH OR WITHOUT ADDITIONAL PREMIUM PAYMENTS. (Specification II)

1. As to damage that might result from the existing landslide peril, the Court held that appellant would be liable for all that might occur in the future—even after expiration of the terms for which the policies were written; and that the policies would remain in full force and effect until such time as the Court made a further order that the existing landslide had stabilized, and even thereafter unless then cancelled by appellant [Finding XVI, R 32; Judgment, ¶3, g, R 37-38; Judgment, ¶5, R 38].

We assume it may be asserted confidently that appellant is not worse off by having served notices of cancellation, than it would be if no such notices had been served. Let us look at the situation of continuing liability for landslide damage in that light.

Here were policies insuring against landslide, and a landslide occurs during their terms. As we have

seen, the general rule is that an insurer is only liable for damage occurring to the property insured during the policy term. The fire cases are an exception to this rule, grounded in the very nature of combustion which is a continuing and continuous process not ordinarily separable into recognizable time compartments so that to allocate part of the loss as pre-expiration loss and part as post-expiration loss would be a practical impossibility. [See, Argument, I, A and D (¶¶1, 2)]

A landslide during its temporary periods of high activity may indeed equate to the fire situation and, in a proper case upon a proper showing, justify application of the same rule, for the same reason. But no such showing was made here. On the contrary, the evidence shows a massive slide condition moving only occasionally, and now and again over a period of months causing some damage to the insured houses [R 50-54]. When these policies expire, for all that appears, the slide may have been inactive for a long time, and it would be entirely practical to ascertain the amount of damage done within the policy term.

There is, therefore, in this record no support whatever for the decree that liability for landslide damage will continue beyond the policy terms *and* thereafter for as long as the slide continues *and* thereafter until the court has decreed that the slide is over *and* thereafter until appellant serves notices of cancellation of the policies.[15]

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[15]We deliberately ignore the "alternatives" that appellant may be sooner relieved of liability (a) by paying to appellees the full

2. As to damage that might result from hazards other than landslide, the Court in effect granted to appellant an option to continue the policies in force after expiration of the terms for which they were written under a most complex and strange arrangement.

To understand this arrangement, we must examine the policies. The one that covered on the residence occupied by appellees [Ex 1] was written for a three-year term commencing 5 May 1955 and expiring 5 May 1958. The premium was stated to be $237 for the full term, if paid at inception; or, if paid in installments, a total of $244.90 payable $86.90 on inception plus $79 on 5 May 1956 and a like amount on 5 May 1957. The other policy [Ex 2] was written for a term of one year expiring 15 July 1957 for a total premium of $70.10. Its "Annual Renewal Plan Endorsement" gave to appellees the option to renew the policy annually for a maximum of four additional years on payment of an annual premium for each such additional year *calculated on the rates currently in use at the time of each renewal.*

The judgment speaks [¶3, R 36] of the "policy periods . . . which included October 1, 1956", and contrasts these with "every successive period". For such "successive periods" (without limit of time, except for duration of the landslide), appellees may continue the policies in force by payment (or tender)

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face amount of its policies, or (b) by persuading appellees to "stipulate in writing to the fact that [all] duties and liabilities under said policies . . . have been fully met and performed" [R36].

of a premium for the period "in the amount established by the policies for the period which included October 1, 1956".

In the case of the one-year policy [Ex 2], it is clear that the policy period "which included October 1, 1958" was the original policy year ending 15 July 1957. But note that the policy provided specifically (a) that if the option to renew was exercised the premium payable was *not* the original premium (as the judgment provided), but rather a premium based upon the rates current at the time of renewal; and (b) that the right to renew would be lost if the policy was cancelled by either party before the renewal option was exercised. In both of these respects, then, the judgment ignored the agreement of the parties and attempted to make a completely new contract for them.

In the case of the three-year policy, the situation is more difficult. In referring to the policy period "which included October 1, 1956" was the Court referring to the original policy term ending 5 May 1958, so that at that time appellees to exercise the renewal option contained in the judgment would have to pay the full three-year premium of $237? Or did the Court have reference to the annual premium payment periods, so that appellees could renew each year on 5 May for a premium of $79? We do not know the answer to this, as the judgment is unintelligible on this point.

In any event, and under either interpretation, the Court has attempted to make a new contract for the

parties—or rather a whole series of new ones—an accomplishment which, we submit is quite beyond the judicial powers.

Absent cancellation, there is no tenable theory that occurs to us by which the Court could justify an extension of these policies for an indefinite period beyond their expressed dates of termination to cover losses from perils that had not happened, were not about to happen, and might never happen. The most that can be said is that perhaps they were somewhat more likely to happen because of the landslide condition than was the case when the policies were issued. There was, however, no evidence to this effect. But the law is clear that such a situation is not sufficient to bring into operation any post-expiration liability for damages.

And cancellation notices having been served, the case is *a fortiori.*

Appellees attempted to establish inability to obtain insurance coverage against hazards other than landslide, but the Court refused to admit such evidence as being immaterial [R 69-71]. The Court was right. See, the *Treadwell* case and other authorities on cancellation cited and discussed above [Argument, I, B].

3. With respect to loss from landslide and to loss from other hazards, the Court exceeded its powers in declaring in effect that the cancellation clause in the policies ceased to be operative because of the occurrence of the landslide and would continue to remain inoperative until further order of the Court [Judgment, ¶2, R 35-36; ¶5, R 38].

C. THE INJUNCTION AGAINST CANCELLATION WAS UNWARRANTED. (Specification III)

For the reasons already stated, the Court erred in enjoining appellant from cancelling the policies [Judgment, ¶4, R 38].

CONCLUSION

The attempted cancellations were valid, and were effective to cancel the policies in their entirety pursuant to the express right to cancel granted by the policies. It is not contended that the liability of appellant for damage from the existing landslide was or could be effected by the notices of cancellation.

The judgment should be reversed, and the cause remanded for further proceedings to ascertain and enter judgment for appellees the landslide damage incurred prior to the expiration dates of the policies.

Dated, San Francisco, California,
5 May 1958.

Respectfully submitted,
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(Appendix Follows.)

Appendix

TABLE OF EXHIBITS

[Rule 18,2(f), Court of Appeals, Ninth Circuit]

All exhibits have been transmitted in original form to the Clerk of the Court of Appeals. They have not been reproduced in the printed Transcript of Record.

No.	Description	Page Number, Transcript of Record Identified	Offered	Rec'd/Rej'd
	Plaintiffs' (Appellees') Exhibits:			
1.	Insurance Policy #HOB16557	48	48	49
2.	Insurance Policy #04-500340	48	48	49
3.	Cancellation Notices (4)	48	48	49
4.	Letter, 1/14/57	68	68	68
	Defendant's (Appellant's) Exhibits:			
A.	Letter, 1/22/57	78	78	78